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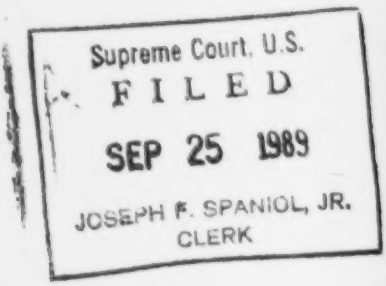

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROLAND L. GOAD

Petitioner

v.

MARY BETH GOAD

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT AT TEXARKANA

ROLAND L. GOAD, Petitioner
310 Sara Lane
Huntsville, Texas 77340
(409) 291-2430
(pro se)

November 1, 1989

QUESTIONS PRESENTED

1. Should Court reverse clearly erroneous conclusion that Texas court lacked subject matter jurisdiction to hear this case?

2. Does a divorce decree apportioning "Air Force Retirement benefits" qualify as a "court order" under Spouses' Protection Act?

3. Does Consumer Credit Protection Act limit amount of Petitioner's pay subject to garnishment; and, if so, may this limitation be enforced as of right in Texas State court?

4. Has Congress acted in excess of its authority by permitting a state court to determine Petitioner's right to retired pay? Or,

(5) permitting Petitioner's pay to be diverted without prior notice or any opportunity for a hearing? Or,

(6) allowing the USFSPA to apply to Petitioner's final divorce decree entered before this Court's McCarty decision?

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IN THE

SUPREME COURT OF THE UNITED STATES

NO.

ROLAND L. GOAD [1]

Petitioner,

v.

MARY BETH GOAD

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS FOR
THE SIXTH SUPREME JUDICIAL DISTRICT
AT TEXARKANA

The Petitioner, Roland L. Goad, respectfully prays that a writ of certiorari issue to review the per curiam opinion and order of the Texas Court of Appeals for the Sixth Supreme Judicial District entered in this proceeding on February 28, 1989.

1/ This caption contains the names of all parties.

CITATIONS TO OPINIONS BELOW

The judgment of the Court of Appeals of Texas, Sixth Supreme Judicial District, was entered on February 28, 1989 (App. A) and has been reported,[2] affirming the dismissal for want of subject matter jurisdiction in the trial court (App. L), the Court of Appeals then denied Petitioner's timely third motion for rehearing on March 28, 1989 (App. G). Thereafter, on June 28, 1989, the Texas Supreme Court denied Petitioner's timely application for writ of error (App. H), and on September 13, 1989 denied motion for rehearing on application for writ of error (App. I).

A chronology of relevant actions in the courts below is detailed in the Appendix at pp. 53a-56a.

2/ Goad v. Goad, 768 S.W.2d 356 (Tex.App.-Texarkana 1989).

JURISDICTION

The third (and last) opinion of the Court of Appeals of Texas, Sixth Supreme Judicial District was rendered on February 28, 1989 (App. A). Petitioner's third motion for rehearing was denied on March 28, 1989 (App. G). Application for writ of error in the Texas Supreme Court was denied on June 28, 1989 (App. H) and a timely motion for rehearing on application for writ of error was overruled on September 13, 1989 (App. I).

This petition for writ of certiorari will have been filed in this Court before the expiration of 90 days from September 13, 1989.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES THAT THE CASE INVOLVES

U.S.CONST., Art. VI, cl. 2:

(2) This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.

U.S.CONST., AMND. 1:

Congress shall make no law respecting an establishment of religeon, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

U.S.CONST., AMND. 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Malitia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.CONST., AMND. 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S.CONST., AMND. 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 U.S.C. § 1408(a)(2)(C):

(a) In this section ...

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree) which ...

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

10 U.S.C. § 1408(c)(1):

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(c)(2):

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

15 U.S.C. § 1672(c):

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

15 U.S.C. § 1677(1):

This section does not annul, alter, or affect, or exempt any person from complying with, the laws of any State (1) prohibiting garnishments or providing for more limited garnishments than are allowed under this subchapter, ...

28 U.S.C. § 1257(a):

Final judgments and decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Cons-

titution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2403(a):

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the pubkic interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all rights of a party and be subject to the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

37 U.S.C. § 701(c):

(c) An enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void.

32 C.F.R. Part 63.3(e):

Court Order. As defined under 10 U.S.C. 1408 (a)(2), a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such decree. It includes a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or

approved property settlement incident to such previously issued decree. The court order must provide for the payment to the member's former spouse of alimony, child support, or a division of property. In the case of a division of property, the court order must specify that the payment is to be made from the member's disposable retired pay.

32 C.F.R. Part 63.6(h)(6):

The designated agent shall comply with a stay of execution issued by a court of competent jurisdiction and shall suspend payment of disputed amounts pending resolution of the issue.

TEXAS CONST., ART. I, Sec. 19:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEXAS CONST., ART. V, Sec. 8:

District Court jurisdiction consists of exclusive appellate, and original jurisdicition of all actions, proceedings, and remedies, except in cases where exclusive or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

TEXAS CONST., ART. XVI, sec. 28:

No current wages for personal services shall ever be subject to garnishment, except for the enforcement of court-ordered child support payments.

THE UNITED STATES AS A PARTY

Since the proceeding draws into question the constitutionality of the Act of September 8, 1982, 96 Stat. 730, 731, 10 U.S.C. § 1408(c)(1), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

Accompanying this petition is an affidavit of service showing that three (3) copies of this petition have been served on the Solicitor General, Department of Justice, Washington, D.C. 20530.

STATEMENT OF THE CASE

The parties were divorced pursuant to a decree signed by a visiting judge in the 272nd District Court of Brazos County, Texas on September 19, 1980. (App. N). In the apportionment of property, Respondent was awarded a fraction of Petitioner's "Air Force Retirement benefits." There was no appeal.

In McCarty v. McCarty, 453 U.S. 210 (1981) this Court held that the federal statutes then governing military retired pay prevented state courts from treating such pay as community property. This Court concluded that treating such pay as community property would do clear damage to important military personnel objectives. Id. at 228. In reaching this conclusion, this Court relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retired pay to satisfy property settlements. Id. at 228-32.

The Uniformed Services Former Spouses' Protection Act (USFSPA) was enacted effective February 1, 1983, purporting to annul the McCarty decision. The Act requires that, in the case of a division of property, the decree must specify that payment is to be made from disposable retired pay. 10 U.S.C. § 1408(a)(2)(C); 32 CFR Part 63.3(e).

On June 24, 1985, Mary Goad requested the Air Force to honor her divorce decree as a "court order" and to pay directly to her a portion of Petitioner's disposable retired pay. Her request was immediately approved and payments began in September 1985 and have continued to the present time. Her request was not accompanied by any summons, writ, warrant, mandate, or other process from a court directed to the Air Force. Petitioner's first, and only, notice of the garnishment was sent to him by an Air Force agent after the payments had been approved. The Air Force

procedure does not provide for any prior notice or an opportunity for a hearing before the garnishment is approved.

The instant action is the last of several attempts made by the Petitioner to get an order quashing the writ of garnishment. Previous efforts were simply ignored by the Texas court. This action was brought in the 272nd District Court (the original trial court that issued the divorce) on March 17, 1988 (App. O). The regular trial judge recused himself on April 2, 1988 (App. J) and the case was transferred to the 361st District Court of Brazos County.

On April 8, 1988, Mary Goad filed her plea to the jurisdiction (App. P). [3]

3/ This Court does not have subject matter jurisdiction over this cause of action because the alleged, and non-existent, writ of garnishment about which plaintiff complains is not a writ issued by any court within the State of Texas; because the defendant has taken no action within the territorial jurisdiction of the State of Texas which would give rise to a cause of action under the laws of the State of Texas; and because the question of the propriety of the Air Force in complying with the Texas divorce decree is governed exclusively by federal law. (App. P, 33a-34a).

The trial judge sustained the plea to the jurisdiction and dismissed the action on May 20, 1988 for want of jurisdiction over the subject matter. (App. L). Also the trial judge "having taken judicial notice of all other proceedings involving the parties filed in Brazos County" imposed a monetary sanction of $1,548 (App. K) for "frivolous" litigation.

The Texas Court of Appeals, Sixth Supreme Judicial District at Texarkana, affirmed (App. A) and imposed additional sanctions for those prior actions brought by Petitioner in Brazos County seeking to quash the writ of garnishment and for a pending civil rights suit involving Brazos County that was filed in federal court on September 8, 1986. (App. A, 10a-11a).

Petitioner brings this petition for a writ of certiorari to review the judgment of the Court of Appeals.

FEDERAL QUESTIONS PRESENTED

(1)

"Should Court reverse clearly erroneous conclusion that Texas Court lacked subject matter jurisdiction to hear this case?"

The assertion that the Texas court was without subject matter jurisdiction was raised in Mary Goad's "Plea to the Jurisdiction" (App. P, 33a-34a) filed in the trial court on April 8, 1988.

Petitioner responded by asserting that:

> his "right to seek redress for grievances in the courts of this State is protected by the First Amendment of the Constitution of the United States which is made applicable to the states by the Fourteenth Amendment."
>
> "This right to petition for redress of grievances is the birthright of every American citizen and the accepted heritage of all civilized people ..."

(App. Q, 35a).

The trial court overruled this fundamental question by sustaining the plea to the jurisdiction (App. L, 23a), and dismissing

the action for want of jurisdiction over the subject matter.

The question was raised in the Court of Appeals in the "Appellant's Brief" (App. R, 37a) filed on August 29, 1988:

> "The district court clearly had subject-matter jurisdiction over these claims. Article V, Section 8, of the Texas Constitution provides that district courts may hear and determine any cause that is cognizable by either courts of law or equity ..."

The question was renewed in the First Motion for Rehearing (App. S, 48a) filed on January 3, 1989:

> "Nothing in the USFSPA even so much as hints that state courts have been divested of their jurisdiction to enforce their own judgments, and if any such implication is to be inferred, it would clearly contravene the express provisions of the Tenth Amendment of the United States Constitution. Besides, constitutional jurisdiction of a district court cannot be taken away by a legislative act. Mitchell v. Cornwall, 314 S.W.2d 437, 439 (Tex.Civ.App.-El Paso 1958, no writ)."

The Court of Appeals refused to consider the question by asserting that:

> "the trial court did not err in its determination that it lacked subject matter jurisdiction on the basis that Goad failed to allege a cause of action cognizable in a Texas court. His pleadings do not allege a garnishment order issued by any jurisdiction." (App. A, 4a).

The Court went on to say:

> "The Act does not give the State court jurisdiction to supervise the performance of the duties specifically delegated to the Armed Forces. Furthermore, this Act does not create the procedural mechanism to reopen a final state court judgment." (App. A, 5a).

(2, 3 & 5)

"Does a divorce decree apportioning 'Air Force Retirement benefits' qualify as a 'Court Order' under Spouses' Protection Act?"

"Does the Consumer Credit Protection Act limit the amount of Petitioner's pay subject to garnishment; and, if so, may this limitation be enforced as of right in Texas courts?"

"Has Congress acted in excess of its authority by permitting Petitioner's pay to be diverted without prior notice or an opportunity for a hearing?"

These questions were raised in the "Original Petition" (App. O, 29a-31a) filed on March 17, 1988.

These questions were overruled by the trial court when it sustained the plea to the jurisdiction (App. P) and dismissed the action for want of subject matter jurisdiction. (App. L).

These questions were presented to the Court of Appeals in "Appellant's Brief" (App. R) filed on August 29, 1988:

> (2) "The term 'Air Force Retirement benefits' as employed in the decree of divorce (Tr. 33, 86), rather than the required term 'retired pay,' renders subject instrument insufficient and ineffective as a 'court order' as defined in 10 U.S.C. 1408(a)(2)(C). Also, the decree fails to specify any definite amount of money awarded to Mary Beth Goad and therefore fails to satisfy the rule that in order to support a writ of garnishment or execution, the judgment being enforced must be for a definite sum (Tr. 25, 64, 65)." (40a-41a).
>
> (5) "The continuing garnishment of Appellant's disposable retired pay has unconstitutionally deprived him of his property without due process of law because it was instituted without prior

notice or any opportunity for a hearing; thereby violating the due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the Texas Constitution. (Tr. 60-63). (42a)

(3) "Article XVI, section 28 of the Texas Constitution provides that current wages for personal services shall not be subject to garnishment except for court ordered child support. This exemption specifically includes wages and salaries paid periodically for personal services. Bell v. Indian Livestock Co., 11 S.W. 344, 346 (Tex. 1889)." (45a)

"These garnishment restrictions in the Texas Property Code are more restrictive than the federal limitations, but these Texas restrictions are adopted into and made a part of the federal scheme by operation of 15 U.S.C. 1677, which states that: This subchapter does not alter, or affect, or exempt any person from complying with, the laws of any State prohibiting garnishments or providing for more limited garnishments than are allowed under this subchapter. See: Killian v. Lawson, 387 So.2d 960 (Fla. 1980)." (46a)

"This statute includes a direct command running to all courts, both State and federal, and is self-executing. The federal exemptions apply to military retired pay, because such pay represents current earnings. See: Evans v. Evans, 429 F.Supp. 580 (W.D. Okla. 1976)." (46a)

The Court of Appeals overruled these federal questions by asserting that:

> "under Texas community property law, the spouse has an ownership right in the retirement proceeds, and thus an account receivable based upon a division of property. This would technically not be a garnishment because the spouse is not a judgment creditor, but obtained the judgment as a declaration of her ownership rights in the proceeds." (App. A, 5a, n. 3). And that "this Act does not create the procedural mechanism to reopen a final state court judgment." (5a).

(4)

"Has Congress acted in excess of its authority by permitting a state court to determine Petitioner's right to retired pay?, Or

(6)

by allowing the USFSPA to apply to Petitioner's final divorce decree entered before this Court's McCarty decision?"

These questions were raised by the Court of Appeals when it wrote:

> (4) "Upon dissolution of marriage, this federal act provides for the State court to make a dtermination of the division of property. This was done in previous

litigation. The Act does not give the State court jurisdiction to supervise the performance of the duties specifically delegated to the Armed Forces." (App. A, 5a).

(6) "Roland Goad, relying upon McCarty, asserts that military retirement benefits are not a species of property subject to division upon divorce. Divorce decree predating the McCarty decision are not subject to attack on the basis of McCarty." (App. A, 3a, n.2).

Petitioner addressed these issues in his motions for rehearing:

(4) "The rates of pay established in the federal regulations may not be changed except by legislation which embodies both the will and deliberate judgment of Congress. The matter was entrusted to Congress to be dealt with according to its discretion and not for delegation to State courts. State courts are not charged with nor are they required to consider the impact of their decisions on military manpower or management of the armed forces or other aspects of National Affairs. These issues are the exclusive domain of Congress. Under our Constitution, the people - from whom all sovereignty is derived - have entrusted Congress with the vital responsibility for deciding when and where military pay will be disbursed. It is natural that the responsibility for that decision should be lodged in the Congress, whose members must come before the electorate periodically to account for their stewardship.

This is the very essence of representative government and a democracy, and State courts must respect this source of government power, the careful delegation of that power by the framers, and must not permit themselves to assume powers given exclusively to the Legislative Branch of the Federal Government."

"Because of the purely federal nature of Appellant's pay, the rights and entitlements of such pay must be determined exclusively with reference to the applicable federal statutes that deal with the subject, rather than any rule or decision that has been incorporated in a nine-year-old divorce decree, and this right to determine the amounts of pay to be received by the Appellant may not be delegated to, nor assumed by, a State Court." (App. U, 51a-52a).

(6) "Congress, in passing the USFSPA, has not changed, modified, or repealed 37 U.S.C. 701(c). It has only enacted a declaratory statute purporting to retroactively overrule the Supreme Court's interpretation. This action violates the most basic precept of our Constitution - the separation of powers. This general rule was stated in Langever v. Miller, 76 S.W.2d 1025 (Tex. 1934):

* * * * *

> As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts of the future to adopt a particular construction of a law which the legislature permits to remain in force.

Id. at 1036, quoting from 1 Cooley, Constitutional Limitations, 190-192 (8th Ed. 1927)." (App. T, 50a).

JURISDICTION OF THE STATE DISTRICT COURT

In Texas, the District Courts have original and appellate jurisdiction in probate matters and general supervisory control over Commissioner's Court, in addition, these Courts have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or the Constitition, and have the power to issue writs of habeas corpus, mandamus, injunction, certiorari, sequestration, attachments, garnishment, and all writs necessary to enforce their jurisdiction. See: Salazar v. United States Air Force, 849 F.2d 1542, 1547 (CA 5 1988); TEX.CONST., ART. V., Sec. 8.

REASONS FOR GRANTING THE WRIT

The dismissal for want of jurisdiction on the basis that "Goad failed to allege a cause of action cognizable in a Texas court." (App. A, 4a) is contrary to the seminal case of Bell v. Hood, 327 U.S. 678, 682 (1946):

> Jurisdiction ... is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief may be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

The dismissal is contrary to Texas case law also: "that the mere failure of a petition to state cause of action does not show want of jurisdiction in the court." Bybee v. Fireman's Fund Ins. Co., 160 Tex. 429, 331 S.W.2d 910, 917 (1960).

Sustaining the plea to jurisdiction on the basis that "the question of the propriety of the Air Force in complying with the Texas divorce decree is governed exclusively by federal law," (App. P, 34a) is in conflict with the rule stated by this Court that State courts are not free to decline jurisdiction over federal questions when properly presented "where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." Martinez v. California, 444 U.S. 277, 283 n.7 (1980), citing Testa v. Katt, 330 U.S. 386, 394 (1947).

Texas' rules of court should not interfere with, let alone deny Petitioner's substantive federal rights. However, sustaining the court below will deny Petitioner his federal rights, because:

> The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. ... If an act of Congress gives a penalty (meaning civil or remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court.

Claflin v. Houseman, 93 U.S. 130, 136-7 (1876).

Analysis must begin with the well-established presumption that state courts may assume jurisdiction over cases arising under federal law. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981), citing Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-8 (1962).

The assertion that "The Act does not give the State court jurisdiction to supervise the performance of the duties specifically delegated to the Armed Forces." is

inconsistent with the express provisions of the federal regulations stating that:

> The designated agent shall comply with a stay of execution issued by a court of competent jurisdiction and shall suspend payment of disputed amounts pending resolution of the issue.

32 C.F.R. Part 63.6(h)(6).

The assertion that Mary Beth Goad "owns" a portion of Petitioner's pay is contrary to the provisions of 10 U.S.C. § 1408(c)(2) that a spouse does not acquire any right, title, or interest which can be sold, assigned, or transferred and is contrary to the dicta in Mansell v. Mansell, 109 S.Ct. 2023, 2029 n.10 (1989) that the Senate Report expressly contemplates that the statute will preempt state law.

And, the conclusion that the term "Air Force Retirement benefits" may be used interchangeably with the required term "disposable retired pay" does not comport with the findings of this Court that:

> "under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property."

Id. at 2028.

This Court also observed that:

> The Act also creates a payment mechanism under which the Federal Government will make direct payments to a former spouse who presents, to the Secretary of the relevant military service, a state-court order granting her a portion of the military retiree's disposable retired or retainer pay.

Id. at 2026.

The Act is conclusive, has been construed by this Court, and provides no interstitial hollow for the making, execution, or enforcement of a divorce decree apportioning "Air Force Retirement benefits" as community property. No mere ipsi dixit of a state court can invalidate the positive provisions of the federal enactment that only disposable retired pay may be apportioned. Expressio unuis est exclusio alterius.

Attempts to define the "direct pay" procedures as other than a "garnishment" flies in the face of the definition provisions of 15 U.S.C. § 1672(c) defining the term as any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt; and also conflicts with the decision in Simononok v. Simononok, 787 F.2d 1517, 1521 n.12 (CA 11 1986), where it was stated:

> The Act draws a distinction between "direct payments" and "garnishment." See 10 U.S.C. § 1408(d)(5). This distinction is purely semantical. Garnishment is a proceeding whereby property owed to one individual is applied to payment of that individual's debt to another. Black's Law Dictionary at 612 (5th Ed. 1979). The direct payment procedure in this case would seem to fit that definition.

The Court also implicitly found that the Act failed to afford due process:

> "Because it is beyond peradventure that Government cannot take a portion of an individual's pay, pay to which he is statutorily entitled, and give it to

> another without at least complying with the requirements of due process."

787 F.2d at 1521.

In 1968, Congress enacted the Consumer Credit Protection Act (CCPA) in its first venture into the area of wage garnishment. The Act limited the maximum portion of an employee's earnings subject to garnishment to 25% of his or her disposable earnings per pay period, except for child support or alimony obligations. These restrictions were predicated on the power granted to Congress to regulate commerce and were effective to supersede all state laws in conflict therewith by virtue of the Supremacy Clause in Article VI of the Constitution. The Act was briefly mentioned in Hisquierdo v. Hisquierdo, 439 U.S. 572, 587 n.20 (1979). The Act applies in Texas and the military member is an indispensable party in an action brought against the Air Force. Breedlove v. U.S. Dept. of Air Force, 569 S.W.2d 582, 584 (Tex.Civ.App. -

Tyler 1978, no writ).

"Garnishment" is defined as "any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt," 15 U.S.C. § 1672(c); and, any order which orders or coerces a principal defendant to consent to withholding by a garnishee-defendant, or to allegedly consent voluntarily to such withholding, is, for the purposes of the Act, the same as an order which itself directly requires withholding. Marshall v. District Court for the Forty-First-b Jud. Dist., 444 F.Supp. 1110, 1116 (E.D. Mich. 1978). And could encompass a constructive trust levied on assets. Guidry v. Sheet Metal Workers Nat. Pension Fund, 856 F.2d 1457, 1463 (CA 10 1988), cert. granted, Number 88-1105, June 26, 1989. The Act has been largely ignored by the courts in Texas and the Act presents an important question of federal law which has not been, but should be settled by this Court.

"The regulation of the compensation of the officers of the army belongs to the Legislative Department of the Government." United States v. Williamson, 23 Wall. (90 U.S.) 411, 416 (1874). And, "it is not in the power of the Executive Department, or any branch of it, to reduce the pay of an officer of the army." Id. If the Commander-in-Chief is without authority to reduce the pay of his officers and men, how may a State judge in Texas assume such authority? "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government." Mistrella v. United States, 109 S.Ct. 647, 654 (1989).

This Court has never countenanced the notion that one of its judgments may be subject to revision or refused full faith and credit by another department of government or by the States. The rule was first observed in Hayburn's Case, 2 Dall. 409 (1792), and

has never been departed from. It has been emphatically stated that:

> "Judicial jurisdiction implies the power to hear and determine a cause and, inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject judgments of the Supreme Court to the reexamination and revision of any other tribunal or any other department of the government."

United States v. O'Grady, 22 Wall. 641, 647 (1875).

Should McCarty be applied retroactively to decree entered before June 26, 1981?

"The federal constitution has no voice upon the subject" of retroactivity. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932). However, because the Court of Appeals has used this doctrine to foreclose Petitioner's opportunity to challenge the garnishment of his pay instituted in 1985, the court has "federalized" the question so that it is ripe for decision, if it is relevant here.

CONCLUSION

For all the foregoing reasons, this Court should exercise jurisdiction under Section 1257 of the Judicial Code and grant this petition for writ of certiorari to review the decision and order of the Texas Court of Appeals in this case dated February 28, 1989 with respect to the federal questions presented, either summarily (Rule 23.1) or in a plenary fashion, after full briefing and oral argument.

Respectfully submitted.

November 1, 1989

ROLAND L. GOAD, Petitioner
310 Sara Lane
Huntsville, Texas 77340
(409) 291-2430

(pro se)

Per curiam opinion of the Texas Court of Appeals entered on February 28, 1989 from which Petitioner sought writ of error in the Texas Supreme Court which was denied on June 28, 1989 and motion for rehearing which was overruled on September 13, 1989. This case has been published and is found in the Southwest Reporter, 2nd, Volume 768, page 356.

(page 1)

Court of Appeals
Sixth District
Texarkana, Texas

Roland L. Goad - Appellant) Appealed from
No. 9680 v.) the 361st Judicial District
Mary Beth Goad - Appellee) Court of Brazos
) County, Texas

- -

PER CURIAM

Roland Goad appeals from an order of the district court dismissing his suit for want of jurisdiction. Goad had instituted a suit seeking an order to quash, dissolve, and recall a "writ of garnishment" and an order to require restitution.[1]

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[1] Roland Goad represented himself in the court below and represents himself on appeal.

The defendant, Mary Goad, filed a plea to the jurisdiction and an answer in which she sought sanctions for frivolous litigation. The trial court entered orders on May 20, 1988, dismissing Roland Goad's suit for want of jurisdiction and imposing sanctions in the amount of the attorney's fees incurred by Mary Goad in defending the litigation, $1,548.00. Roland Goad then filed a motion for new trial which was denied on August 1, 1988. On appeal he contends that the trial court erred in dismissing his suit for want of jurisdiction and by imposing sanctions.

By the parties divorce decree of September 19, 1980, Mary Goad was awarded inter alia, 12/27th of the military retirement benefits received by Roland Goad. Roland Goad did not appeal from this order, and the divorce decree became final.[2] The record shows that in 1985 Mary Goad (page 2)

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2 / The divorce decree became final prior to the Supreme Court's decision in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (Cont'd)

applied to the Department of the Air Force for direct withholding of her fractional interest of the retirement pay, pursuant to 10 U.S.C. § 1408. The Air Force Accounting and Finance Center in Denver, Colorado, then instituted direct payments. Neither the Air Force Accounting Center nor the United States government was made a party to the instant action. These direct payments to Mary Goad are what Roland Goad termed a "writ of garnishment" in his petition. Mary Goad correctly contends that his claim is an effort to make an impermissible collateral attack on the

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(Note 2 continued)
(1981) (federal law precludes state courts from dividing nondisability military retirement pay pursuant to its community property laws.) Roland Goad, relying upon McCarty, asserts that military retirement benefits are not a species of property subject to division upon divorce. Divorce decrees predating the McCarty decision are not subject to attack on the basis of McCarty. Wilson v. Wilson, 667 F.2d 497 (5th Cir.), cert. denied, 458 U.S. 1107, 102 S.Ct. 3485, 73 L.Ed.2d 1368 (1982); Segrest v. Segrest, 649 S.W.2d 610 (Tex.), cert. denied, 464 U.S. 894, 104 S.Ct. 242, 78 L.Ed.2d 232 (1983); Trahan v. Trahan, 682 S.W.2d 532 (Tex.App.-Austin 1984, writ ref'd n.r.e.), appeal dism'd, 475 U.S. 1002, 106 S. Ct. 1171, 89 L.Ed.2d 291 (1986); Tyson v. Alexander, 672 S.W.2d 624 (Tex.App.-Amarillo 1984, no writ).

judgment of September 19, 1980.

In her plea to the jurisdiction, Mary Goad challenged the court's jurisdiction, inter alia, on the ground that the writ was non-existent. A court with general judicial powers may not entertain jurisdiction of a particular case if no state of facts exist which would authorize the court to exercise its jurisdiction. Easterline v. Bean, 121 Tex. 327, 49 S.W.2d 427, 430 (1932). A review of the record indicates that the trial court did not err in its determination that it lacked subject matter jurisdiction on the basis that Goad failed to allege a cause of action cognizable in a Texas court. His pleadings do not allege a garnishment order issued by any jurisdiction.[3] Accepting the plea-

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3 / Garnishment is a remedial statutory means by which a judgment creditor may enforce the collection of a money judgment from the nonexempt property of a judgment debtor in the hands of a third party. Beggs v. Fite, 130 Tex. 46, 106 S.W.2d 1039 (1937); W. Dorsaneo, 2 Texas Litigation Guide § 42.01 (1988). The Beggs case is cited in Black's Law Dictionary for the definition of garnishment. The Texas Supreme Court unfortunately used the word garnished (Cont'd)

dings as true, they merely allege actions by the Air Force accounting center as authorized by 10 U.S.C. § 1408. Upon dissolution of marriage, this federal act provides for the State court to make a determination of the division of the property. This was done in previous litigation. The Act does not give the State court jurisdiction to supervise the performance (page 3) of the duties specifically delegated to the Armed Forces. Furthermore, this Act does not create the procedural mechanism to reopen a final state court judgment. Allison v. Allison, 690 S.W.2d 340, 345 (Tex.App.-Fort Worth 1985) writ ref'd n.r.e., 700 S.W.2d 914 (Tex. 1985). We overrule appellant's first point of error.

(Note 3 continued)
to apply to a spouse's attachment of her interest in military retirement benefits. However, under Texas community property law, the spouse has an ownership right in the retirement proceeds, and thus an account receivable based upon a division of the community property. This would technically not be a garnishment because the spouse is not a judgment creditor, but obtained the judgment as a declaration of her ownership rights in the proceeds. A federal court also used the term garnishment in reference to a direct payment from the military of a portion of retirement pay. Simononok v. Simononok, 787 F.2d 1517 (11th Cir. 1986).

Roland Goad contends in his second point of error that the trial court erred in imposing sanctions pursuant to Tex.R.Civ.P. 13. He first argues that the trial court effectively deprived itself of jurisdiction to enter sanctions by dismissing his action. The inherent plenary power to deal with sanctions after the entry of the judgment is recognized in Rule 13 which allows the trial court to withdraw sanctions at any time prior to the expiration of the trial court's plenary power. Thus, a trial court may impose sanctions after a judgment has been entered. Lindley v. Flores, 672 S.W.2d 612 (Tex.App.-Corpus Christi 1984, no writ). Goad also contends that the order imposing sanctions is void because it constitutes a second final judgment in contravention of Tex.R.Civ.P. 301. Although the imposition of sanctions could be properly included within a judgment, an order imposing sanctions is not a judgment. Lindley v. Flores, supra. Thus, a trial court can

enter a separate order concerning sanctions before or after the final judgment in the proceeding.

Roland Goad asserts the trial court failed to comply with Tex.R.Civ.P. 166a when imposing sanctions. Tex.R.Civ.P. 13 does not refer to summary judgment procedures. The appellant offers no authority for the proposition that summary judgment procedures must be followed, and we find none. He specifically complains that he was not provided notice of the imposition of sanctions as required by Tex.Civ.Prac. & Rem. Code Ann. § 9.012 (Vernon Supp. 1989). Chapter 9 of this Code has been repealed insofar as it conflicts with Tex.R.Civ.P. 13. Rule 13 does not explicitly require prior notice and would permit the trial court to impose sanctions sua sponte. Furthermore, he had notice that Mary Goad was seeking sanctions by her original answer which included a prayer for sanctions. The record also indicates that he was present at the hearing (page 4)

on the plea to the jurisdiction and sanctions in which the court granted the defendant's motion on sanctions.

Roland Goad further complains that, in imposing sanctions, the trial court improperly took judicial notice of all previous proceedings between the parties in Brazos County, Texas. On May 12, 1988, eight days prior to the motion hearing, Mary Goad filed defendant's request for judicial notice. In this request, she provided information on four prior cases between the parties in Brazos County. A court must take judicial notice of adjudicative facts if a party so requests and provides the necessary information. Tex. R.Evid. 201(d). A trial court may take judicial notice of its own records in the same or closely related cases. Gardner v. Martin, 162 Tex. 156, 345 S.W.2d 274, 276 (1961); Fajkus v. First National Bank of Giddings, 735 S.W. 2d 882, 887 (Tex.App.-Austin 1987, writ denied). Three of the other proceedings were closely related cases in the district court of Bra-

zos County. The fourth case was filed in the county-court-at-law of Brazos County, and the fifth case was in a federal district court. The specific nature of each of these proceedings is set forth in an affidavit of Mary Goad's attorney submitted to the trial court.[4] The record indicates that Roland Goad did not avail himself of Tex.R.Evid. 201(e) by requesting an opportunity to be heard as to propriety of the court's taking judicial notice of these adjudicative facts, nor did he object to the court taking judicial notice of these cases. We find no error, but even if the trial court erred, the error was waived.

Lastly, Roland Goad complains that the affidavit of Mary Goad's attorney, which detailed the fees and expenses charged to her client, was not based upon personal know-

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4 / Some authorities contend that a request for judicial notice does need to be in a form that is admissible as evidence. See Welborn, Judicial Notice Under Article II of the Texas Rules of Evidence, 19 St. Mary's L.J., 1, 18 (1987), and sources cited therein.

ledge. This contention is without merit because the attorney necessarily had personal knowledge of these charges. We overrule appellant's second point of error and all contentions thereunder. (page 5)

Pursuant to Tex.R.App.P. 84, Mary Goad requests this Court to award damages to her because the appellant has taken this appeal for delay and without sufficient cause. This rule provides in part:

> In civil cases where the court shall determine that an appeal or writ of error has been taken for delay and without sufficient cause, then the appellate court may, as part of its judgment, award each prevailing appellee or respondent an amount not to exceed ten percent of the amount of damages awarded to each appellee or respondent as damages against such appellant or petitioner. (Emphasis added.)

Tex. R.App.P. 84. This action was appellant's sixth suit against Mary Goad pertaining to her receipt of military retirement benefits as ordered in the final divorce decree. [5]

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[5] The previous actions as indicated in the record are as follows: (Continued)

In reading Roland Goad's brief, as well as his pleadings in the court below, we believe that Roland Goad possessed sincere personal expectations of prevailing. However, whether the matter is groundless and thus without sufficient cause must be decided on

(Note 5 continued)

(1) In July 1982, Roland Goad instituted a suit in the district court of Brazos County seeking to vacate a portion of the decree pertaining to the award of a fractional interest of military retirement benefits to Mary Goad.

(2) Roland Goad brought an action challenging the district court's jurisdiction in Brazos County to hold him in contempt for refusing to pay the ordered portion of the benefits to Mary Goad. See, Ex Parte Goad, 690 S.W.2d 894 (Tex. 1985).

(3) He brought an action in the district court of Brazos County, urging that Mary Goad's request for direct payment of her fractional interest of the benefits by the Air Force was a writ of garnishment which he sought to have quashed.

(4) In the county-court-at-law of Brazos County, he filed a suit claiming that the divorce decree did not meet federal requirements with respect to the award of military retirement benefits. This action was transferred to the district court and consolidated with (3). It was then removed to federal court where it was ultimately dismissed.

(5) Roland Goad brought an action in United States District Court alleging a violation of his civil rights by the enforcement of the payment of benefits through contempt proceedings. This action is pending.

the basis of objective legal expectations, and to hold otherwise would be to reward Roland Goad for failing to get legal advice and failing to evaluate his allegations properly in the light of binding legal precedents. We find Roland Goad's appeal to be without sufficient cause. (page 6)

Rule 84, however, requires not only that the appeal be taken without sufficient cause, but that it be done for the purpose of delay. Inasmuch as the record indicates that Mary Goad's receipt of her portion of the retirement pay has not been interrupted or delayed by this suit, we cannot find that this appeal delayed Mary Goad's benefits. However, we do not interpret this rule to allow sanctions only in the event of a delay of benefits to the opposing party. Sanctions can also be invoked when there is an attempt further to delay the resolution of the dispute and the completion of the litigation. The fact that this is the sixth proceeding on this subject

matter, not including the original decree that made the property division, convinces us that Roland Goad is intent upon continuing litigation against his ex-spouse despite judicial rulings. We believe that this type of delay justifies sanctions on appeal, and we award Mary Goad sanctions in the amount of double the court costs.

February 28, 1989
Filed February 28, 1989

Publish

Judgment of the Court of Appeals at Texarkana, February 28, 1989: (as amended Mar. 22)

JUDGMENT

BE IT REMEMBERED that on Tuesday the 28th day of February, A.D. 1989, the Court of Appeals for the Sixth Supreme Judicial District of Texas met in the City of Texarkana. Present William J. Cornelius, Chief Justice, Charles Bleil, Justice, Ben Z. Grant, Justice, and Louise Waldrop Lohse, Clerk, when the following proceedings, among others, were had, to-wit:

Roland L. Goad - Appellant	)	Appealed from the 361st Judicial District Court of Brazos County, Texas
No. 9680 v	)	
Mary Beth Goad - Appellee	)	

THIS CAUSE came on to be considered on the transcript of the record, the statement of facts, upon the briefs of the parties, and upon appellant's motion for rehearing; and the Court, after considering the same, is of the opinion and finds that there was no error in the judgment of the court below.

It is accordingly CONSIDERED, ORDERED AND ADJUDGED that the judgment of the trial court of May 20, 1988, be, and hereby is, in all things AFFIRMED, in conformity with the written opinion of this Court of even date on file herein; that appellant Roland Goad shall pay as sanctions double the costs on the appeal, whether in this Court or in the Court below, for which execution issue; and the Court, noting that appellant has deposited cash into the registry of the court below in lieu of appeal bond, hereby directs the clerk of the court below to pay out of such deposit all costs of this appeal; and that this judgment be certified to the court below for observance.

Notice from the Clerk by letter dated October 4, 1988 advising parties of an order entered by the Court of Appeals (immaterial formal matter has been omitted)

October 4, 1988

RE: Case No. 06-88-09680-CV

STYLE: Goad, Roland L.
V: Goad, Mary Beth

The Court entered its order this date in the referenced proceeding whereby Appellant's Motion to Advance Appeal and For An Order Suspending Writ of Garnishment Pending Resolution of This Appeal was OVERRULED.

- -

App. D

Notice from the Clerk by letter dated January 24, 1989 advising parties of an order entered by the Court of Appeals (immaterial formal matter has been omitted)

January 24, 1989

RE: CASE NO. 06-88-09680-CV

STYLE: Goad, Roland L.
V: Goad, Mary Beth

The Court entered its order this date in the referenced proceeding whereby Appellant's Pro Se Motion to Strike and Plea in Bar was OVERRULED.

Notice from the Clerk by letter dated December 20, 1988 advising parties of an order entered by the Court of Appeals (immaterial formal matter has been omitted)

December 20, 1988

RE: CASE NO. 06-88-09680-CV

STYLE: Goad, Roland L.
V: Goad, Mary Beth

The judgment of the Trial Court in the referenced proceeding on appeal from Brazos County was this date AFFIRMED, in conformity with the written Opinion of this Court of even date.

A true copy of this Court's Opinion is enclosed for each of you. Also enclosed is a copy of this Court's Judgment, which will be entered herein unless good cause for changing same is shown within 15 days.

Notice from the Clerk by letter dated January 24, 1989 advising parties of an order entered by the Court of Appeals (immaterial formal matter has been omitted)

January 24, 1989

RE: CASE NO. 06-88-09680-CV

STYLE: Goad, Roland L.
V: Goad, Mary Beth

The Court entered its order this date in the referenced proceeding whereby Appellant's Pro Se Motion for Rehearing was OVERRULED. This Court's Opinion of December 20, 1988 is hereby withdrawn and this substituted therefor.

A true copy of this Court's Opinion is enclosed for each of you.

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App. G

Notice from the Clerk by letter dated March 28, 1989 advising parties of an order entered by the Court of Appeals (immaterial formal matter has been omitted)

March 28, 1989

The Court entered its order this date in the referenced proceeding whereby Appellant's Third Pro Se Motion for Rehearing was OVERRULED.

PLEASE TAKE DUE NOTICE HEREOF.

Notices from the Clerk of the Texas Supreme Court advising the parties of orders entered in the case. (immaterial formal matter has been omitted)

June 28, 1989

RE: Case No. C-8630

STYLE: ROLAND L. GOAD
v: MARY BETH GOAD

Today, the Supreme Court of Texas denied the referenced application for writ of error with the notation, Writ Denied. Petitioner's motion for order suspending writ of garnishment is overruled.

- -

App. I

September 13, 1989

RE: Case No. C-8630

STYLE: ROLAND L. GOAD
v. MARY BETH GOAD

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Order recusing judge of 272nd District Ct.

NO. 31,031-272

ROLAND L. GOAD	)	IN THE DISTRICT COURT OF
VS	)	BRAZOS COUNTY, TEXAS
MARY BETH GOAD	)	272ND JUDICIAL DISTRICT

ORDER OF RECUSAL

This Court having determined that the presiding judge should recuse himself from trying the above-captioned case for the reason that: Appearance of impropriety for present trial judge to continue.

The undersigned presiding judge hereby recuses himself in this case, and in accordance with the joint order of the District Courts and County Courts-at-law filed December 20, 1985, orders that the District Clerk assign this case to another District Court of Brazos County.

SIGNED this 2nd day of April, 1988.

s/John Delaney
JUDGE PRESIDING

Order imposing sanctions, entered by the trial court at 3:40 p.m., May 20, 1988.

NO. 31,031-361

ROLAND L. GOAD Plaintiff vs. MARY BETH GOAD Defendant	)	IN THE DISTRICT COURT OF BRAZOS COUNTY, TEXAS 361st DISTRICT COURT

ORDER GRANTING SANCTIONS PURSUANT TO RULE 13

At the hearing before the Court held on May 20, 1988, the Defendant herein, by and through her attorney of record, made an oral motion pursuant to Rule 13, Texas Rules of Civil Procedure, for sanctions to be imposed against the Plaintiff pro se, Roland L. Goad. The Court, having considered the statements of the parties in open court, the pleadings in this cause, and having taken judicial notice of all other proceedings involving the parties filed in the courts of Brazos County, finds that the presumption of the Plaintiff's good faith is overcome, that the petition and motion for summary judgment were filed in violation of Rule 13.

The Court has before it the affidavit of Mary L. Sinderson, attorney of record for Defendant Mary Beth Goad, for the fees and costs of necessary time in defending against the frivolous petition and motion for summary judgment filed by the Plaintiff, in the amount of $1,548.00. Now, therefore, it is

ORDERED that Plaintiff, ROLAND L. GOAD, shall pay to Defendant, MARY BETH GOAD, within 30 days of the date of the Order of Dismissal herein the sum of $1,548.00, as sanctions for frivolous litigation pursuant to Rule 13, unless prior to the expiration of said 30 day period Plaintiff Roland L. Goad shall withdraw by written pleading filed in the records of this cause his Original Petition and his Motion for Summary Judgment previously filed herein.

SIGNED this 20 day of May, 1988.

s/Carolyn Ruffino
JUDGE PRESIDING

Order dismissing action in trial court, entered in records at 3:40 p.m. May 20, 1988.

NO. 31,031-361

ROLAND L. GOAD Plaintiff	)	IN THE DISTRICT COURT OF
vs.	)	BRAZOS COUNTY, TEXAS
MARY BETH GOAD Defendant	)	361st DISTRICT COURT

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On the 20th day of May, 1988 an oral hearing was held before the Court on the Defendant's Plea to the Jurisdiction, and the Court, having considered the Plaintiff's Original Petition, the Defendant's jurisdictional plea, the written Reply of the Plaintiff to the Defendant's Dilatory Pleas, and the argument of the Plaintiff pro se and of the Defendant by and through her counsel of record, the Court finds no jurisdictional basis for the Plaintiff's action. Accordingly, this cause is hereby

DISMISSED for lack of subject matter jurisdiction.

SIGNED this 20 day of May, 1988.

s/Carolyn Ruffino
JUDGE PRESIDING

Trial Court's Order denying Motion For New Trial, August 1, 1988.

NO. 31,031-361

ROLAND L. GOAD Plaintiff	)	IN THE DISTRICT COURT OF
vs.	)	BRAZOS COUNTY, TEXAS
MARY BETH GOAD Defendant	)	361st DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL

On the 1st day of August, 1988 the Court held a hearing on the Plaintiff's Motion for New Trial filed in this cause on the 26th day of May, 1988, and the Court, having considered the Plaintiff's Motion, the Response filed by the Defendant, and having heard the argument of Plaintiff pro se and counsel for Defendant, the Motion for New Trial is hereby DENIED.

SIGNED this 1st day of August, 1988.

s/Carolyn Ruffino
JUDGE PRESIDING

Relevant portions of the 1980 divorce decree apportioning "Air Force Retirement benefits" as community property.

No. 23,862-A

IN THE MATTER OF THE MARRIAGE OF MARY BETH GOAD AND ROLAND LEE GOAD	) IN THE DISTRICT) COURT OF BRAZOS) COUNTY, TEXAS) 272ND JUDICIAL DISTRICT

DECREE OF DIVORCE

(page 2)

IT IS DECREED that the estate of the parties be divided as follows * * * * *

Petitioner is awarded the following as Petitioner's sole and separate property, and Respondent is hereby divested of all right title, and interest in and to such property.

(page 3)

* * * * *

5. All right, title and interest in and to twelve/twenty-sevenths (12/27) of the United States Air Force Retirement benefits of ROLAND LEE GOAD AF# - 462368682.

* * * * *

Relevant portions of Petitioner's "Original Petition" filed in the 272nd District Court on March 17, 1988:

NO. 31,031-272

ROLAND L. GOAD Plaintiff	)	IN THE DISTRICT COURT OF
vs.	)	BRAZOS COUNTY, TEXAS
MARY BETH GOAD Defendant	)	272ND JUDICIAL DISTRICT

ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

1. COMES NOW, ROLAND L. GOAD, Plaintiff, seeking an order quashing, dissolving, and recalling a writ of garnishment; and for an order requiring restitution for those amounts of his pay that have been garnished up to the date of judgment in this case. * * * * *

(page 2)

4. Plaintiff is a member of the Regular Air Force on the retired list entitled to earn pay for his continuing military status and his availability for immediate recall to active duty by the Secretary of the Air Force at any time deemed in the interest of national defense.

5. The parties were divorced pursuant to a decree signed by a visiting judge in the 272nd District Court of Brazos County, Texas on September 19, 1980. In the apportionment of property Mary was apportioned a fraction of Plaintiff's "Air Force Retirement benefits". No appeal was perfected.

6. On June 26, 1981, the United States Supreme Court held that military retirement pay was not property subject to apportionment at divorce. McCarty v. McCarty, 453 U.S. 210 (1981). * * * * *

8. The Uniformed Services Former Spouses' Protection Act was passed effective February 1, 1983, purporting to retroactively annul the McCarty decision. The statute requires that, in the case of a division of property, the divorce decree must specify that payment is to be made from disposable retired pay. 10 U.S.C. 1408(a)(2)(C); 32 CFR Part 63.3(e).

9. The 1984 Defense Authorization Act, Public Law 98-94, was also enacted which, by amendment to 10 U.S.C. 688(a), now makes the Plaintiff subject to the far-reaching liability for involuntary recall to active duty that had theretofore only applied to Regular Officers and member of the Ready Reserve.

* * * * *

11. On June 24, 1985, while Plaintiff was held in jail in execution of the judgment Mary sought to enforce, she requested the Air Force to honor the same judgment as a court order and to pay directly to her a portion of Plaintiff's disposable retired pay. Her request was approved and payments began on September 3, 1985 and have continued to the present time. The divorce decree was not accompanied by any summons, writ, warrant, mandate, or other process from a Texas court directed to the Air Force. Plaintiff's first, and only, notice of the garnishment of his pay was sent to him by an Air Force agent

after the garnishment had been tentatively approved. Plaintiff could defeat the garnishment only by establishing that the divorce decree was defective or inconsistent with some other court order. The Air Force procedure does not provide for any prior notice or an opportunity for a hearing before barnishment of Plaintiff's pay.

12. On January 29, 1986 and again on June 5, 1986, the Plaintiff brought actions in the 272nd District Court seeking an order (page 4) quashing, dissolving, and recalling the writ of garnishment. The Air Force was joined as garnishee, normally an indispensable party. Those actions were removed to federal court where the Air Force was severed as a defendant and the actions brought against Mary Goad were dismissed <u>without prejudice</u> in April 1987.

* * * * *

<u>BASIS FOR CLAIMS</u>

14. Garnishment or execution against Plaintiff's disposable retired pay, while in the

hands of the Air Force,

(a) is prohibited by the Texas Constitution provision which provides that no current wages for personal services shall be subject to garnishment except for the enforcement of court-ordered child support orders;

(b) operates as a prohibited garnishment that contravenes express provisions of federal law and therefore violates the proscription in 15 U.S.C. 1673(c) that no court may make, execute, or enforce any order or process in violation of that section;

(c) conflicts with the self-executing provisions of 37 U.S.C. 701(c) that an enlisted member of the Air Force may not assign his (page 5) pay, and if he does so, the assignment is void; * * * * *

15. Garnishment of Plaintiff's disposable retired pay, prior to its receipt by the Plaintiff, has unconstitutionally deprived Plaintiff of his property without due process of law, because it was made without prior notice

or an oportunity for a hearing - thus violating the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 19 of the Texas Constitution.

16. The term "Air Force Retirement benefits" as employed in the decree of divorce, renders subject decree insufficient and ineffective as a "court order," as defined in the Spouses' Protection Act. * * * * *

(page 7)

CLAIMS

23. Plaintiff seeks an order quashing, dissolving and recalling the writ of garnishmentserved on the Air Force by the Defendant, MARY BETH GOAD, on or about June 24, 1985; and for an order requiring her to indemnify the Plaintiff for those amounts of his pay that have been unlawfully diverted to her by the Air Force - such liquidated demand being $21,690.72 as of March 1, 1988.

NON-JOINDER

24. The Air Force is required by the terms of the Spouses' Protection Act to honor any order from this Court quashing the writ of garnishment or otherwise staying those proceedings, and is therefore not an indispensable party to these proceedings. For this reason, the Air Force has not been joined as a third party.

PRAYER

WHEREFORE, Plaintiff, ROLAND L. GOAD, respectfully requests the Court, after notice and hearing, enter judgment:

(a) dissolving and recalling the writ of garnishment;

(b) requiring the Defendant, MARY BETH GOAD, to indemnify (page 8) Plaintiff for those amounts of his pay that have been diverted to her from September 1, 1985 up to the date of judgment in this action.....

Plea to the jurisdiction filed by Mary Goad on or about April 8, 1988:

NO. 31,031

ROLAND L. GOAD	)	IN THE COUNTY COURT
	)	
VS	)	AT LAW NO. 2
	)	
MARY BETH GOAD	)	OF BRAZOS COUNTY, TEXAS

DEFENDANT'S PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

MARY BETH GOAD, Defendant in the above-styled and numbered cause of action, makes this plea for the purpose of objecting to the court's exercise of subject matter jurisdiction over the cause of action alleged by ROLAND L. GOAD, plaintiff, in his Original Petition and as grounds therefor shows the following:

This Court does not have subject matter jurisdiction over this cause of action because the alleged, and non-existent, writ of garnishment about which plaintiff complains is not a writ issued by any court within the State of Texas; because the defendant has

taken no action within the territorial jurisdiction of the State of Texas which would give rise to a cause of action under the laws of the State of Texas; and because the question of the propriety of the Air Force in complying with the Texas divorce decree is governed exclusively by federal law.

(page 2)

THEREFORE, defendant prays that the Court dismiss this cause of action for lack of subject matter jurisdiction and tax all costs to plaintiff. .....

Plaintiff's reply to Defendant's dilatory pleas, filed on April 19, 1988:

NO. 31,031

ROLAND L. GOAD	)	IN THE COUNTY COURT
	)	
VS	)	AT LAW, NUMBER TWO
	)	
MARY BETH GOAD	)	BRAZOS COUNTY, TEXAS

PLAINTIFF'S REPLY TO
DEFENDANT'S DILATORY PLEAS

(page 5)

19. In Part V of her answer, Counsel demonstrates her ability to copy some of the operative words from Rule 13 of the Texas Rules of Civil Procedure and then proceeds to demand sanctions, protective orders, injunctive relief, and dismissal with prejudice and award of attorney fees. She even demands that sanctions be imposed pursuant to Rule 215 for abuse of discovery. What discovery?

* * * * *

21. Plaintiff's right to seek redress for grievances in the courts of this State is protected by the First Amendment of the Constitution of the United States which is made

applicable to the states by the Fourteenth Amendment. (page 6)

22. This right to petition for redress of grievances is the birthright of every American citizen and the accepted heritage of all civilized people; and is protected and safeguarded in the high precincts of prominence and power as well as the remote and obscure dwelling place of the dispossesed and disfrachised citizen abiding at 310 Sara Lane. Consequently, any attempt to retard, impede, or limit Plaintiff's right to petition for a redress of grievances in the Courts of this State would clearly be violative of this protected constitutional right.

.....

Relevant portions of "Appellant's Brief" filed in the Court of Appeals on August 29, 1988:

(page 1)

POINT OF ERROR NUMBER ONE: The 361st District Court of Brazos County erred in dismissing Appellant's petition seeking an order quashing, dissolving, and recalling a writ in the nature of garnishment and for an order requiring restitution of those amounts of Appellant's pay that have been garnished.

(page 5)

18. The district court clearly had subject-matter jurisdiction over these claims. Article V, Section 8, of the Texas Constitution provides that district courts may hear and determine any cause that is cognizable by either courts of law or equity. .....

(page 6)

22. The legislative history of the USFSPA clearly discloses an intention to permit the military member to have some forum for challenging the garnishment of retired pay. The

Act certainly does not pre-empt or displace State court jurisdiction over divorce decrees and their enforcement. The Senate Report explains subsection (d) of section 1408:

> Subsection (d) of section 1408 constitutes a waiver of the immunity of the United States from legal process issued by courts ...

Senate Report No. 502, 97th Cong., 2nd Sess. 17, reprinted in 1982 U.S. Code, Cong. & Ad. News 1612. (page 7)

23. The Senate Report further explains subsection (g) of section 1408:

> This subsection is designed to provide a measure of protection to the member whose pay is affected by a court order, so that the member may take whatever action, legal or otherwise, which the member may believe to be appropriate in response to the service of the court order.

Id. at 1618.

24. The Code of Federal Regulations requires the Air Force to honor any stay of execution issued by a court of competent jurisdiction:

> The designated agent shall comply with a stay of execution issued by a court

> of competent jurisdiction and shall suspend payment of disputed amounts pending resolution of the issue.

32 C.F.R. Part 63.6(h)(6) (July 1, 1987).

(page 14)

Mary Beth Goad used DD Form 2293 "Request for Former Spouse Payments From Retired Pay" (Tr. 29), as a writ of garnishment. With her writ she annexed a copy of her Texas Divorce Decree (Tr. 31).

43. Her attempt to distinguish the "direct payments" as being something other than a "garnishment" flies in the face of the Texas Supreme Court's statement that "The USFSPA provisions are intended only as a limit on the amount of disposable retired pay which can be garnished ..." Grier v. Grier, 731 S.W. 2d 931, 933 (Tex. 1987). The California Supreme Court has determined that: "The Uniformed Services Former Souses' Protection Act is primarily concerned with the garnishment of military retired pay." Casas v. Thompson, 720 P.2d 921, 931-2 (Cal. 1986), cert. denied,

107 S.Ct. 659 (1987). Justice White of the Supreme Court had occasion to refer to "direct garnishment" when discussing the procedures established pursuant to the USFSPA. See: Rose v. Rose, 107 S.Ct. 2029, 2045 (1987) (White, J., dissenting). The Eleventh Circuit has found that the "direct payment" procedures established by the Air Force pursuant to the USFSPA fit the definition of "garnishment." Simononok v. Simononok, 787 F.2d 1517, 1521 n.12 (CA 11 1986). Lastly, the Air Force's own data base, by which Appellant's pay is recorded, reflects that the "direct payments" are being withheld as "garnishment for debt." (Tr. 43). * * * * *

(page 15)

The term "Air Force Retirement benefits" as employed in the decree of divorce (Tr. 33,86), rather than the required term "retired pay," renders subject instrument insufficient and ineffective as a "court order" as defined in 10 U.S.C. 1408(a)(2)(C). Also, the decree

fails to specify any definite amount of money awarded to Mary Beth Goad and therefore fails to satisfy the rule that in order to support a writ of garnishment or execution, the judgment being enforced must be for a definite sum. (Tr. 25, 64, 65).

45. The Uniformed Services Former Spouses' Protection Act, as amended by Public Law 98-525, effective October 19, 1984, (98 Stat. 2547, 2548) provides in relevant part:

> In this section "court order" means a final decree of divorce ... which in the case of a division of property specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable or retainer pay of a member to the spouse or former spouse of that member.

10 U.S.C., 1408(a)(2)(C).

46. The implementing Code of Federal Regulations also provide in relevant part:

(page 16)

> A former spouse of a member is eligible to receive direct payment from the retired pay of that member only pursuant to a court order that satisfies the requirements and conditions specified in this part. In the case of a division

> of property, the court order must specifically provide that payment is to be made from disposable retired pay.

32 C.F.R., Part 63.6(a)(1) (July 1, 1987).

(page 18)

The continuing garnishment of Appellant's disposable retired pay has unconstitutionally deprived him of his property without due process of law because it was instituted without prior notice or any opportunity for a hearing; thereby violating the due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the Texas Constitution. (Tr. 60-63). * * * * *

(page 21)

Mary Beth Goad asserts that she own as her sole and separate property, a fraction of Appellant's future pay. (Tr. 81).

61. Her position is at odds with the provisions of 10 U.S.C. 1408(c)(2) providing that the USFSPA does not create any right, title or interest which can be sold, assigned,

transferred, or otherwise disposed of by a former spouse. The Senate Report explains:

> Paragraph (2) of subsection (c) provides that, regardless of any other law, nothing in section 1408 creates, gives, or permits to exist any right, title, or interest which may be sold, assigned, transferred, or otherwise disposed of by a spouse or former spouse. It is recognized that this limitation is contrary to certain concepts of property laws, especially the concepts of community property laws... However the spouse or former spouse should have no greater interest in the retired or retainer pay of a member than the member has. And a member has no right to transfer his retired pay on death. Nor can the member sell, assign, transfer, or otherwise dispose of the member's right to receive retired pay.

Senate Report No. 502, 97th Cong., 2nd Sess. 16, reprinted in 1982 U.S.Code, Cong. & Ad. News 1611. * * * * * (page 22)

Provision was made by the Act of May 8, 1792, Chapter 37, Section 4 (1 Stat. 280): "Sec. 4 <u>And be it further enacted</u> that no assignment of pay made after the first day of June next, by a non-commissioned officer or private shall be valid." The statute surv-

ives today in 37 U.S.C. 701(c):

> An enlisted member of the Army or Air Force may not assign his pay, and if he does so, the assignment is void.

65. This 196-year old, self-executing statute states, in plain shirt-sleeve English that Appellant's pay may not be assigned. The Supreme Court has construed this statute:

> Retired pay cannot be attached to satisfy a property settlement incident to the dissolution of marriage. In addition, an Army enlisted man may not assign his pay, 37 U.S.C. § 701(c) ... This limitation would appear to serve the same purpose as the prohibition against "anticipation" discussed in Hisquierdo.

McCarty v. McCarty, 453 U.S. 210, 228 n.22 (1981). * * * * * (page 25)

75. A service member's right in matters relating to pay and allowances are grounded solely on federal statutes and regulations. See: Bell v. United States, 366 U.S. 393, 401 (1961); Crispino v. United States, 3 Cl.Ct. 306, 313 (1983). And, since the right to receive retired pay is a federal right "federal law, of course, governs the interpretation of

the nature of that right." Free v. Bland, 369 U.S. 663, 669-670 (1962). * * * * *

(page 26)

Article XVI, section 28 of the Texas Constitution provides that current wages for personal services shall not be subject to garnishment except for court ordered child support. This exemption specifically includes wages and salaries paid periodically by an employer for personal services. Bell v. Indian Livestock Co., 11 S.W. 344, 346 (Tex. 1889). * * * * *

77. These garnishment restrictions in the Texas Property Code are more restrictive than the federal limitations, but these Texas restrictions are adopted into and made a part of the federal scheme by operation of 15 U.S.C. 1677, which states that: This subchapter does not alter, or affect, or exempt any person from complying with, the laws of any State prohibiting garnishments or providing for more limited garnishments than are all-

owed under this subchapter. See: Killian v. Lawson, 387 So.2d 960 (Fla. 1980). (page 27)

78. The federal law was amended in 1977 to provide that:

> (c) No court of the United States or any State, and no State (or officer or agency thereof) may make, execute, or enforce any order or process in violation of this section.

15 U.S.C. 1673(c).

79. This statute includes a direct command running to all courts, both State and federal, and is self-executing. The federal exemptions apply to military retired pay, because such pay represents current earnings. See: Evans v. Evans, 429 F.Supp. 580 (W.D. Okla. 1976). * * * * *

Relevant portions of "Appellant's Motion For Rehearing" filed on January 3, 1989:

(page 2)

The term "garnishment" cannot be limited to the narrow technical definition adopted by the Court in Note 3. In defining the term "garnishment" in the Federal Wage Garnishment Law, Congress did not differentiate between the different kinds of obligations, nor did it restrict the term to a specific withholding. "The term 'garnishment' means any legal or equitable procedure through which earnings of an individual are required to be withheld for payment of any debt." 15 U.S.C. 1672(c). (Tr. 54). The Act includes a sweeping federal preemption clause that specifies that no court of the United States or any state, and no state (or officer or agency thereof) may make, execute or enforce any order or process in violation of the restrictions on garnishment. 15 U.S.C. 1673(c) (Tr. 53). It would be indecourous for the courts to circumvent the statute by the simple expedient of

redefining garnishment to exclude the so called "direct pay" in the USFSPA.

Your appellant does not seek, in this action, to change either a jot or a dot on Mary Beth's divorce decree. Appellant's contention is that her decree cannot be enforced in the manner accomplished in this case, thereby depriving the Appellant of his property without due process of law and denying him his first amendment right to petition for redress of grievances in the Courts of this State. * * * * * (page 3)

Nothing in the USFSPA even so much as hints that state courts have been divested of their jurisdiction to enforce their own judgments, and if any such implication is to be inferred, it would clearly contravene the express provisions of the Tenth Amendment of the United States Constitution. Besides, constitutional jurisdiction of a district court cannot be taken away by a legislative act. Mitchell v. Cornwall, 314 S.W.2d 437,

429 (Tex.Civ.App.-El Paso 1958, no writ). Also, once jurisdiction is lawfully and properly acquired, no subsequent fact or event in the particular case serves to defeat the jurisdiction. Wagins v. Malbis Memorial Foundation, 163 Tex. 274, 354 S.W.2d 368, 371 (1962). According to the Supreme Court "Analysis must begin with the well-established presumption that state courts may assume jurisdiction over cases arising under federal law." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981).

* * * * *

Relevant portions of "Appellant's Second Motion for Rehearing" filed February 2, 1989.

(page 16)

44. Congress, in passing the USERRA, has not changed, modified, or repealed 37 U.S.C. 701(c). It has only enacted a declaratory statute purporting to retroactively overrule the Supreme Court's interpretation. This action violates the most basic precept of our Constitution - the separation of powers. This general rule was stated in Langever v. Miller, 76 S.W.2d 1025 (Tex. 1934):

* * * * *

> As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts of the future to adopt a particular construction of a law which the legislature permits to remain in force.

Id. at 1036, quoting from 1 Cooley, Constitutional Limitations, 190-192 (8th Ed. 1927).

* * * * *

Relevant portions of "Appellant's Third Motion For Rehearing" filed March 13, 1989.

(page 11)

30. The rates of pay established in the federal regulations may not be changed except by legislation which embodies both the will and deliberate judgment of Congress. The matter was entrusted to Congress to be dealt with according to its discretion and not for delegation to State courts. State courts are not charged with nor are they required to consider the impact of their decisions on military manpower or management of the armed forces or other aspects of National Affairs. These issues are the exclusive domain of Congress. Under our Constitution, the people - from whom all sovereignty is derived - have entrusted Congress with the vital responsibility for deciding when and where military pay will be disbursed. It is natural that the responsibility for that decision should be lodged in the Congress, whose members must come before the electorate

periodically to account for their stewardship. This is the very essence of representative government and a democracy, and State courts must respect this source of government power, the careful delegation of that power by the framers, and must not permit themselves to assume powers given exclusively to the Legislative Branch of the Federal Government.

31. Because of the purely federal nature of Appellant's pay, the rights and entitlements of such pay must be determined exclusively with reference to the applicable federal statutes that deal with the subject, rather than any rule or decision that has been incorporated in a nine-year-old divorce decree, and this right to determine the amounts of pay to be received by the Appellant may not be delegated to, nor assumed by, a State Court. * * * * *

Docket Sheet entries made in the 361st District Court of Brazos County, Case No. 31,031-361, styled Goad v. Goad:

Date Of Orders:	Order of Court (and location in this Appendix):
4/2/88	Signed Order of Recusal. (App. J, 20a)
5/20/88	Plea to jurisdiction - both sides argued. Plea to jurisdiction granted. No jurisdiction. Cause dismissed. Signed Order. (App. L, 23a)
5/20/88	Oral motion for sanctions because frivolous. Granted and Order signed. (App. K, 21a)
8/1/88	Motion for new trial - Both parties argued. Signed Order denying motion for new trial. (App. M, 24a)

Relevant docket entries in the Texas Court of Appeals, Sixth Supreme Judicial District, Case No. 9680, styled Goad v. Goad:

Date of Orders:	Order of Court (and location in this Appendix)
10/4/88	Appellant's Motion to Advance Appeal and For An Order Suspending Writ of Garnishment is Overruled. (App. C, 16a)
12/20/88	Order of dismissal affirmed. Opinion and order issued. (App. E, 17a)
1/24/89	Motion to Strike and Plea in Bar Overruled. (App. D, 16a)
1/24/89	Motion for Rehearing OVERRULED and new opinion substituted for order and opinion of 12/20/88. (App. F, 18a)

Date of Orders:	Order of Court (and location in this Appendix)
2/28/89	Second Motion for Rehearing is OVERRULED and new opinion and order substituted for opinion and order of 1/24/89 which is withdrawn. (App. A & B, 1a - 15a)
3/28/89	Appellant's Third Motion For Rehearing is OVERRULED. (App. G, 18a)

Relevant docket entries in the Texas Supreme Court, Case No. C-8630, styled Goad v. Goad:

Date of Orders:	Order of Court (and location in this Appendix)
6/28/89	Order denying application for writ of error with the notation, Writ Denied. (App. H, 19a)
9/13/89	Order overruling motion for rehearing of the application for writ of error. (App. I, 19a)